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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-557

LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS,

Petitioner,

v.

THE HONORABLE A. LEON HIGGINBOTHAM, JR., JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

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OCTOBER TERM, 1974.

No.

LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS,

Petitioner,

v.

THE HONORABLE A. LEON HIGGINBOTHAM, JR., JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATES JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Local 542, International Union of Operating Engineers, respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Third Circuit, entered in the above-entitled matter on August 12, 1974, denying its Petition for Writ of Mandamus and/or Prohibition directing respondent to cease exercising jurisdiction in an action brought against petitioner and 55 other labor unions alleging violations of the antitrust laws of the United States.

OPINIONS OF THE COURTS BELOW.

The United States Court of Appeals for the Third Circuit filed no opinion in support of its Order of August 12, 1974, denying Petition for Writ of Mandamus and/or Prohibition (No. 74-1772). Said Order is printed, *infra* (Appendix D, p. 11a).

The United States District Court for the Eastern District of Pennsylvania filed no opinion in support of its Order of December 31, 1973, denying petitioner's Motion to Dismiss the antitrust action in *Altemose Construction Co., et al. v. Building & Construction Trades Council of Philadelphia and Vicinity, et al.*, Civil Action No. 73-773. Said Order is printed, *infra* (Appendix B, p. 9a).

The United States District Court for the Eastern District of Pennsylvania filed no opinion in support of its Order of March 12, 1974, denying unions' petition for leave to file interlocutory appeals from the aforesaid denial of Motion to Dismiss. Said Order is printed, *infra* (Appendix C, p. 10a).

JURISDICTION.

The Judgment of the Court of Appeals was entered on August 12, 1974 (Appendix D, *infra*, p. 11a). The jurisdiction of this Court is invoked under 28 U. S. C. A. 1254(1) and under the All Writs Statute, 28 U. S. C. A. 1651.

QUESTIONS PRESENTED.

1. Does the United States District Court have jurisdiction of an action brought under the Anti-Trust Laws of the United States, against labor unions only, alleging that said unions, alone, have acted in restraint of trade, and there is no allegation that the activities of said unions are in aid of a conspiracy of business groups seeking price and market control?

2. Where antitrust action is brought against labor unions, alleging that they have lost antitrust immunity because of activities alleged to violate the National Labor Relations Act, and, thus, arguably subject to said Act, does not exclusive primary jurisdiction lie with the National Labor Relations Board, and should not the District Judge have deferred to the jurisdiction of the Board?

3. Where, in an antitrust action against labor unions alone, the plaintiff fails to identify and/or include as defendants the non-labor entities with whom the unions are alleged to be conspiring, does not the District Court lack jurisdiction because of the failure to include indispensable parties?

STATUTES AND RULE INVOLVED.

The statutory provisions involved are The Sherman Anti-Trust Act, §§ 1 and 2, as amended, 15 U. S. C. A. 1, 2; the Clayton Act, §§ 4, 6, 16, 15 U. S. C. A. 15, 17, 26; the National Labor Relations Act, §§ 7, 8(b)(4)(ii)(A), (B) and 8(e), 29 U. S. C. A. 157, 158(b)(4)(ii)(A) and (B), 158(e); and the Norris-LaGuardia Act, §§ 1, 2, 5, 29 U. S. C. A. 101, 102, 105. The procedural rule involved is F. R. C. P. 19(a). Said provisions are printed as Appendix A, *infra*, p. 1a.

STATEMENT OF THE CASE.

The Complaint in this case alleges a conspiracy in violation of the Sherman Antitrust Act and the Clayton Act, the essence of which is that the unions are attempting to force construction companies with whom they are in collective bargaining relation to cease doing business with subcontractors with whom the unions have no labor agreement, by means of subcontracting clauses in their agreements. (Such clauses are specifically protected by Section 8(e) of the National Labor Relations Act, 29 U. S. C. A. 158(e).)

Petitioner filed a Motion to Dismiss the Complaint upon the grounds that the district court lacked jurisdiction over the subject matter by reason of the exemptive provisions of the antitrust laws, and also because of the exclusive jurisdiction of the National Labor Relations Board, and the failure to join the indispensable parties. The district judge entered an order denying the Motion, but without any opinion (Appendix B, p. 9a). Petitioner and the other defendants below thereupon filed a Petition for Leave under 28 U. S. C. A. 1292(b), which was denied by the court, again without opinion.

Thereafter, petitioner filed a Petition for Writ of Mandamus and/or Prohibition with the Court of Appeals for the Third Circuit, for an order directing the district judge to cease exercising jurisdiction and dismiss the case or, in the alternative, that the said action be stayed pending certification of the labor issues to the National Labor Relations Board. The Court of Appeals denied the petition without argument and without opinion.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The antitrust action against the unions is proceeding in the district court, the plaintiffs' motion to compel discovery yet to be decided. It is obvious from the all-encompassing interrogatories as well as the very nature of the suit, that the anti-union interests have launched a campaign to use discovery procedures in deadly inquisition into union activities which are protected and privileged, seeking to achieve a complete destruction of the trade union movement. Although the Congress has seen fit to specifically protect labor unions from such onslaught, by clear exemption in the antitrust and anti-injunction statutes, the defendant unions have been peculiarly and shockingly deprived of these protections. In view of the immediate and irreparable harm that will necessarily result from any discovery by the employers ordered in an extra-jurisdictional proceeding, this Court's intervention is essential at this time. Appeal in the regular course would be too late. The urgent protective policy mandated by Congress and repeatedly expressed by this Court requires immediate review of these proceedings.

I. The District Court Had No Jurisdiction of the Within Proceedings, and Its Exercise of Jurisdiction Is in Serious and Substantial Conflict With the Decisions of This Court, Including *United States v. Hutcheson*, 312 U. S. 219; *Apex Hosiery Co. v. Leader*, 310 U. S. 469; and *Allen Bradley v. Local 3, IBEW*, 325 U. S. 797.

The history of the antitrust legislation was reviewed in *United States v. Hutcheson*, 312 U. S. 219, 85 L. ed. 788 (1941), where the Court noted that after the Sherman Act became effective, the "controversies engendered by its application to trade union activities" resulted in "efforts to

secure legislative relief from its consequences" and "the Clayton Act of 1914 was the result . . . the fruit of unceasing agitation . . . designed to equalize before the law the position of workingmen and employers as industrial combatants." (U. S. at 229). The Court continues that because some courts chose to apply the Clayton Act exemption too narrowly to satisfy the federal policy, the Norris-LaGuardia Act of 1932, 29 U. S. C. A. 101-115, was enacted, which "removed the fetters upon trade union activities" by further narrowing the court's jurisdiction to grant labor injunctions (U. S. at 230-31). Accordingly, in determining whether trade union conduct may be restricted, the Court said that all of the said statutes must be read "as a harmonizing text." The federal policy now "removes all . . . allowable [trade union] conduct from the taint of being a 'violation of any law of the United States,' including the Sherman Law." (U. S. at 236). Said the Court:

> "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under Section 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness the selfishness of the end of which the particular union activities are the means." (U. S. at 232).

Thus, Norris-LaGuardia effectively terminated the line of anti-trust actions against unions acting as unions.

Such immunity exists even where the union's activity is directed toward the "end" of eliminating non-union competition. In *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 84 L. ed. 1311 (1940), this Court reversed a treble damage award against the union, holding:

> ". . . Since, in order to render a labor combination effective, it must eliminate the competition from

non-union made goods, an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act." (U. S. at 503)

The only exception to the union's immunity from prosecution under the Sherman Act is where unions do *not* act in their *own* interest, and combine with non-labor entities who are violating the Act, to further the latters' interest. This was the holding in *Allen Bradley v. Local 3, IBEW*, 325 U. S. 797, 89 L. ed. 1939 (1945). There, a group of electrical contractors and their suppliers combined to fix prices and monopolize the business in New York. The union joined in this conspiracy, and they all agreed only to do business with specific firms. This Court held that such specific "combination among the three groups, union, contractors, and manufacturers," (U. S. at 800) to achieve such control of the market was a violation of the antitrust laws; and that since the union had conspired with "this combination of business men [who] violated both §§ (1) and (2) of the Sherman Act" (U. S. at 800), the union had lost its immunity under the exempting provision of the Clayton Act. Said the Court:

". . . Finding no purpose of Congress to immunize labor unions who aid and abet manufacturers and traders in violating the Sherman Act, we hold that the district court correctly concluded that the respondents had violated the Act.

"Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, *dependent upon whether the union acts alone or in combination with business groups.* . . ." (U. S. at 810) (Emphasis supplied.)

The union was thus shorn of its immunity specifically because *it had combined with business groups* who were conspiring to violate the Sherman Act. Accordingly, unions may agree among themselves to force the elimination of non-union business, to improve their own business, without any violation of the antitrust laws. More specifically, since these unions are in the construction industry, subcontracting agreements which they make with employers are specifically protected by the National Labor Relations Act, Section 8(e), 29 U. S. C. A. 158(e).

The *Allen Bradley* doctrine has been interpreted by this Court to mean that a labor organization may lose its exemption only when its activity is designed to aid "an employer conspiracy." *Local Union 189, Amalgamated Meat Cutters, et al. v. Jewel Tea Co.*, 381 U. S. 675, 14 L. Ed. 2d 640 (1965); *United Mine Workers of America, et al. v. Pennington*, 381 U. S. 657, 14 L. Ed. 2d 626 (1965).

In *Pennington*, this Court stated (U. S. at 663):

> ". . . In Allen Bradley Co. v. Union, 325 U. S. 797, this Court made explicit what had been merely a qualifying expression in Hutcheson and held that 'when the unions participated with *a combination of businessmen* who had *complete power* to eliminate 'all competition among themselves and *to prevent all competition from others*, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts'." (Emphasis supplied.)

Absolutely essential to plaintiffs' cause of action is a "combination of businessmen." Here, this essential allegation is absent from the Complaint.[1]

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1. In *Bodine Produce, Inc. v. United Farm Workers*, 494 F. 2d 541 (9th Cir. 1974), the court emphasized the distinction between "aiding and abetting" business enterprises, and "unilateral union activity which may achieve an end identical to that which results from labor and business acting in concert" (550-51). The court said that

Plaintiffs in their Complaint attempt to force this case into the *Allen Bradley* exception by alleging a "conspiracy" between the defendants (all labor groups) and unnamed non-labor groups. But it is basic that general allegations of conspiracy without supporting factual allegations are, as a matter of law, insufficient to state an antitrust cause of action. *Heart Disease Research Foundation v. General Motors Corp.*, 463 F. 2d 98, 100 (2d Cir. 1972); *Black & Yates v. Mahogany Assn.*, 129 F. 2d 227, 231-32 (3d Cir. 1941). The Complaint here is devoid of the essential allegations of facts and attendant circumstances.

The Complaint alleges that the agreement between the union and the employers determines the wages to be paid to employees.[2] Such an agreement is obviously just what this Court has held to be immune from the antitrust laws. The subject of wages is the cardinal matter concerning which unions and employers are *required* to bargain and negotiate. In *United Mine Workers v. Pennington, supra*, this Court stated:

> "We think it beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws and that it may as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek the same wages from other employers."

Thus, the only "agreement" which plaintiffs factually allege is one which is specifically exempted from the anti-

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1. (Cont'd.)
unions may properly "unilaterally employ strikes, boycotts and other acts"; that such activity does not violate the antitrust laws, even though such acts may produce a result which is not distinguishable from the result which would follow an illegal combination (551). Thus, it is *the specific type of activity* that is to be considered, and *not the effect thereof.*

2. Complaint, paragraph 10.

trust laws. They do *not* allege that defendants are in conspiracy with the union contractors concerning any matters except those about which they must bargain.

The Complaint in the district court does not allege that there was a conspiracy among business groups to restrain trade to which the unions gave their aid. The allegations charge only a "conspiracy" among *unions*—clearly immune, without exception.

This Petition should be granted upon this ground alone.

II. The National Labor Relations Board Had Primary, Exclusive Jurisdiction. The Instant Case Should Have Been Referred to the NLRB in Accordance With the Decision of This Court in *Local Union 189, Amalgamated Meat Cutters, et al. v. Jewel Tea Co.*, 381 U. S. 675.

The activities alleged in the Complant would, if true, violate the National Labor Relations Act, Section 8(b)(4)(ii)(A) and/or (B), 29 U. S. C. A. 158(b)(4)(ii)(A), (B). As such, they were either protected by Section 7 of the Labor Act, 29 U. S. C. A. 157, or prohibited by Section 8 thereof, 29 U. S. C. A. 158. In either case, they fall within the exclusive jurisdiction of the National Labor Relations Board. This Court said, in *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, 3 L. Ed. 2d 775 (1959):

> "When an activity is arguably subject to § 7 or § 8 of the Act, the States *as well as the federal courts* must defer to the *exclusive* competence of the National Labor Relations Board. . . ." (U. S. at 245) (Emphasis supplied.)

In *Local Union 189, Amalgamated Meat Cutters, et al. v. Jewel Tea Co.*, 381 U. S. 675, 14 L. Ed. 2d 640 (1965), the employer filed a complaint alleging that the union con-

spired with other employers in violation of the Sherman Antitrust Act. The specific activity complained of was bargaining for a marketing-hours restriction. The six Justice majority held that under any circumstances the case was exempt from the antitrust laws. Three of the Justices held that the doctrine of primary jurisdiction in the Labor Board was not applicable because no unfair labor practice was pleaded; the other three Justices held that the Board did have primary jurisdiction. As above stated, however, all six Justices held that the case was exempt from the antitrust laws. All six agreed on the principle of the exclusive primary jurisdiction of the NLRB.

In the instant case, the Complaint specifically pleads an unfair labor practice. Therefore, under either opinion of the six Justices, not only is the case exempt from the antitrust laws, but, in addition, the matter must be referred to the NLRB.

Certiorari should be granted upon this ground alone, also.

III. The Refusal of the Court Below to Order the District Judge to Dismiss the Complaint for Failure to Join an Indispensable Party Is in Conflict With the Decisions of the Courts of Appeals for the Second Circuit in *Heart Disease Research Foundation v. General Motors Corp.*, 463 F. 2d 98 (1972); the Fifth Circuit in *Tucker v. National Linen Serv.*, 200 F. 2d 858 (1953); and the Eighth Circuit in *Neal v. System Board of Adjustment*, 348 F. 2d 722 (1965), Holding That Such Failure Violates Rule 19, F. R. C. P.

It is well established that where the invalidation of a contract is sought *all* parties to that contract are indispensable to the suit. *Tucker v. National Linen Serv.*, 200 F. 2d 858 (5th Cir. 1953); *Ward v. Deavers*, 203 F. 2d 72

(D. C. Cir. 1953). This principle is applicable to collective bargaining agreements. In *Neal v. System Board of Adjustment (Missouri Pacific R. R.)*, 348 F. 2d 722 (8th Cir. 1965), the issue was whether a suit challenging the validity of a collective bargaining agreement between an employer and the union could proceed without joining the union as an indispensable party. Said the court:

> "The Brotherhood, therefore, being a party to that agreement, is clearly an entity whose presence is indispensable to the maintenance of the present suit." 348 F. 2d at 728.

Similarly: *Nix v. Spector Freight Systems, Inc.*, 264 F. 2d 875, 877 (3d Cir. 1959); *Window Glass Cutters League v. American St. Gobain Corp.*, 428 F. 2d 353 (3d Cir. 1970).

In the case at bar, the very legality of the collective bargaining agreements has been challenged. The plaintiffs seek to have them declared invalid. Therefore, plaintiffs were required to join the anonymous "union contractors" as indispensable parties to their action. The failure to do so renders the Complaint fatally defective, and, on this ground, the action should have been dismissed by the District Judge. Neither the District Judge nor the Court of Appeals rendered any opinion or gave any hint as to the reasons for their decision permitting the action to continue.

Certiorari should be granted upon this ground, because of the conflict between the decisions of the Court below and the Courts of Appeals for the other Circuits.

CONCLUSION.

The decisions of the Courts below will have a startling and profound effect against unions generally, and will hamper them in their collective bargaining negotiations with employers who sit back and threaten dire consequences

unless a union withdraws a particular demand which an employer considers burdensome. The Labor Act was specifically designed to protect workingmen from precisely this kind of onslaught by the employers. But the decisions below, if permitted to stand, will completely destroy the effectiveness of the Labor Act. This Court should grant certiorari to prevent this devastating precedent from being established.

Respectfully submitted,

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APPENDIX A.

Statutory Provisions.

Sherman Anti-Trust Act, 15 USCA.

§ 1. *Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or

between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

§ 2. *Monopolizing trade a misdemeanor; penalty.*

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

Clayton Act, 15 USCA.

§ 15. *Suits by persons injured; amount of recovery.*

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by

him sustained, and the cost of suit, including a reasonable attorney's fee.
Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

§ 17. *Antitrust laws not applicable to labor organizations.*

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.
Oct. 15, 1914, c. 323, § 6, 38 Stat. 731.

§ 26. *Injunctive relief for private parties; exception.*

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring

suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.
Oct. 15, 1914, c. 323, § 16, 38 Stat. 737.

National Labor Relations Act, as Amended; 29 U. S. C. A.

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.
July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.

§ 158. Unfair labor practices.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4)(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: . . .

Norris-LaGuardia Labor Anti-Injunction Act, 29 U. S. C. A.

§101. Issuance of restraining orders and injunctions; limitation; public policy.

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining

order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.
Mar. 23, 1932, c. 90, § 1, 47 Stat. 70.

§ 102. Public policy in labor matters declared.

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.
Mar. 23, 1932, c. 90, § 2, 47 Stat. 70.

§ *105. Doing in concert of certain acts as constituting unlawful combination or conspiracy subjecting person to injunctive remedies.*

No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title.

Mar. 23, 1932, c. 90, § 5, 47 Stat. 71.

Rule of Procedure.

Rule 19.

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION.

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

As amended Feb. 28, 1966, eff. July 1, 1966.

APPENDIX B.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 73-773.

ALTEMOSE CONSTRUCTION COMPANY, ASSOCIATED BUILDERS AND CONTRACTORS, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

v.

BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY; ET AL.

Order.

AND NOW, this 31st day of December, 1973, after hearing extensive oral argument from distinguished counsel and upon consideration of the briefs and other supporting documents, it is hereby ORDERED that the Motions of the Defendants to Dismiss this action are hereby DENIED.

By THE COURT:

A. LEON HIGGINBOTHAM, JR., *J.*

APPENDIX C.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 73-773.

ALTEMOSE CONSTRUCTION COMPANY, ASSOCIATED BUILDERS AND CONTRACTORS, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

v.

BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY, ET AL.

Order.

AND NOW, this 12th day of March, 1974, upon consideration of Defendants' Petition for Leave to Appeal pursuant to 28 U. S. C. § 1292(b) and the Plaintiffs' Response thereto, it is hereby ORDERED that said Petition is DENIED.

By THE COURT:

A. LEON HIGGINBOTHAM, JR., *J.*

APPENDIX D.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1772

LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS,

Petitioner,

v.

THE HONORABLE A. LEON HIGGINBOTHAM, JR., JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA,

Respondent.

Present: SEITZ, *Chief Judge* and ALDISERT and GIBBONS, *Circuit Judges.*

Upon consideration of petitioner's application for Writ of Prohibition and Writ of Mandamus in the above-entitled case;

It is ORDERED that petitioner's application for Writ of Prohibition and Writ of Mandamus be and hereby is denied.

By THE COURT,

COLLINS J. SEITZ,

Chief Judge.

Dated: August 12, 1974

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

Nos. 74-412, 74-557.

BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA & VICINITY AND THIRTY-FOUR INDEPENDENT LABOR UNIONS AND/OR LABOR ORGANIZATIONS,

Petitioners in No. 74-412,

AND

LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS,

Petitioner in No. 74-557,

v.

A. LEON HIGGINBOTHAM, JR., JUDGE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI ON BEHALF OF ALL THREE NAMED PLAINTIFFS.

INTRODUCTION.

This is a brief in opposition to two petitions for certiorari, one of which was filed on October 11, 1974, by thirty-five of fifty-seven defendants in an antitrust action pending in the United States District Court for the Eastern District of Pennsylvania, the other of which was filed on November 8, 1974, by another defendant in the same case. The ostensible purpose of petitioners is to obtain review of the denials by the United States Court of Appeals for the Third Circuit of petitions for mandamus which sought review of an interlocutory order of the District Court denying petitioners' motions to dismiss the complaint.

COUNTERSTATEMENT OF QUESTIONS PRESENTED.

1. Where it is alleged in an antitrust action in the federal district court that defendant Trades Council and its constituent member labor organizations have unlawfully combined and conspired among themselves and with non-labor entities, including contractors, suppliers, and lending institutions, to restrain trade and to create a monopoly for the union contractors, did the Court of Appeals commit serious error warranting review by this Court when it denied petitioners' requests for the issuance of a writ of mandamus and/or prohibition, which requests sought review of the denial by the District Court of the defendants' motions to dismiss the Complaint?

2. Where the stated purpose of the petitions for certiorari is to forestall consideration of a discovery motion in the District Court, and there is no indication that the District Court will not protect petitioners' rights under applicable law, is the case of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in the Supreme Court?

COUNTERSTATEMENT OF THE CASE.

A. Parties.

The petitioners in No. 74-412 are the Building and Construction Trades Council of Philadelphia and Vicinity and thirty-four (34) of its constituent members (hereinafter referred to collectively as the "Trades Council"), all of whom are defendants in a civil action pending in the United States District Court for the Eastern District of Pennsylvania, which action is entitled *Altemose Construction Company, Associated Builders and Contractors, Inc., and the Chamber of Commerce of the United States of America v. Building and Construction Trades Council of Philadelphia and Vicinity, et al.*, Civil Action No. 73-773 (hereinafter referred to as the "antitrust action").

Petitioner in No. 74-557 is another defendant in the antitrust action, Local 542, International Union of Operating Engineers (hereinafter referred to as "Local 542").[1]

The nominal respondent is the Honorable A. Leon Higginbotham, Jr., a United States District Court Judge of the United States District Court for the Eastern District of Pennsylvania, to whom the antitrust action has been assigned.

This brief is filed on behalf of the three named plaintiffs in the antitrust action: the Altemose Construction Company, the Associated Builders and Contractors, Inc., suing on behalf of itself and its members who are open-shop contractors[2] in the greater Philadelphia area, and the

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1. Twenty-one other defendant unions have not joined in either petition.

2. An open-shop contractor is "a contractor who does not employ exclusively persons acceptable to or represented by defendants, and does not limit subcontracting exclusively to subcontractors having contracts with or acceptable to defendants" (R. 12a). An open-shop contractor is to be distinguished from a "non-union" contractor as the open-shop contractor may hire union subcontractors.

Chamber of Commerce of the United States of America, suing on behalf of itself and its members who are construction purchasers and users in the greater Philadelphia area.

B. Proceedings in the District Court.

On April 3, 1973, the plaintiffs commenced the antitrust action against the petitioners and twenty-one (21) other labor organizations by the filing of a Complaint in the United States District Court for the Eastern District of Pennsylvania.

Count I of the Complaint alleges that the defendants unlawfully have combined and conspired in violation of Sections 1 and 2 of the Sherman Antitrust Act, 15 U. S. C. §§ 1, 2, among themselves and with non-labor entities to control the construction industry in the greater Philadelphia area by eliminating open-shop contractors from the industry, and to create a monopoly therein for the favored class of the union contractors.[3] Count I further alleges that defendants' conduct is beyond the scope of legitimate labor objectives since defendants: have no dispute with plaintiff Altemose or other open-shop contractors; have expressly disavowed any intent to organize employees of such contractors; have not sought negotiations with such contractors relative to wages, hours, conditions of employment of the employees; but rather, have sought to protect union contractors from competition by open-shop contractors and to create a monopoly for the favored union contractors (R. 13a-24a).[4]

3. A union contractor is "a party to a contract with one or more of the defendant craft unions which requires that employees become or remain members of such craft union or unions on or after a specified period of employment" (R. 12a).

4. Since the record in this Court apparently consists of the printed volume entitled "Motion for Leave to File Petition for Writ of Prohibition and Writ of Mandamus, Petition for Writ of Prohibi-

Count II of the Complaint alleges that the named defendants have combined and conspired among themselves, the objectives and means of the conspiracy being identical to those alleged in Count I (R. 24a-27a).

The allegations of the Complaint are of restraints of the business and product market, not of the labor market. There are no allegations of unfair labor practices in the Complaint.

On July 16, 1973, defendants (including petitioners) moved to dismiss the Complaint, on various grounds, including that the District Court lacked subject matter jurisdiction over the action. On December 31, 1973, the District Court denied the respective motions to dismiss (R. 34a).

All of the defendants then sought permission to file an interlocutory appeal from the December 31, 1973, Order (R. 36a-39a), which motion was denied on March 12, 1974 (R. 41a).

Petitioners (and the other defendants), at that time, took no action to obtain appellate relief.

On April 18, 1974, plaintiffs served upon each defendant interrogatories (R. 43a-69a) and requests for the production of documents for inspection and copying (R. 70a).[5] Petitioners [6] objected to each and every question and to each and every request for production (R. 93a-104a, R. 105a-

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4. (Cont'd.)
tion and Writ of Mandamus, and Appendix" filed in the Court of Appeals by the Trades Council, citations to the record will refer to the page of that volume preceded by the letter "R" (*e.g.*, R. 7a). The lower case letter "a" refers to the appendix included in that volume.

References to parts of the record printed as appendices to the petitions for certiorari will be referred to by identifying letter and page number (*e.g.*, Trades Council Appendix D, p. 4a).

5. The Trades Council filed its Answer and Counterclaim on April 26, 1974 (R. 73a, et seq.); as did Local 542.

6. The Trades Council filed its objections on May 16, 1974; Local 542 filed its objections on May 20, 1974.

106a), whereupon, on June 21, 1974, plaintiffs moved to compel discovery (R. 108a-111a). Petitioners responded on August 7, 1974, and resolution is now pending. The District Court directed the parties to negotiate discovery requests and those negotiations are in process.

C. Proceedings in the Court of Appeals.

Meanwhile, on July 30, 1974, the Trades Council instituted an action in the United States Court of Appeals for the Third Circuit by filing a Motion for Leave to File Petition for Writs of Prohibition and/or Mandamus, asserting as a jurisdictional basis, the All Writs Act, 28 U. S. C. § 1651(a) (R. 4), and naming Judge Higginbotham as respondent. Local 542 filed its petition seeking identical relief on August 2, 1974.

The petitioners requested that the Court of Appeals prohibit the District Court from exercising jurisdiction (R. 32a-33a), and order it to dismiss the Complaint with prejudice (R. 33a), or in the alternative, to stay proceedings and certify issues of fact and law to the National Labor Relations Board (R. 34a).

The Court of Appeals denied Local 542's petition on August 12, 1974 (Local 542 Appendix D, p. 11a), and that of the Trades Council on August 13, 1974 (Trades Council Appendix D, p. 4a). The Trades Council filed its petition for writ of certiorari on October 11, 1974; it was served on plaintiffs' counsel on October 15, 1974. Local 542 filed and served its petition on November 8, 1974.

REASONS FOR DENYING THE PETITION.

A. The Court of Appeals Did Not Commit Error Warranting Review by This Court.

The relief sought here is review of the orders of the Court of Appeals denying the petitions for writs of mandamus and/or prohibition which petitions alleged there was no jurisdiction in the federal district court to hear plaintiffs' case. In so acting, the Court of Appeals did not commit error warranting review by this Court outside the normal appellate procedures.

Prohibition and mandamus are extraordinary remedies, utilized by this Court only in extraordinary cases. In *Ex parte Fahey,* 332 U. S. 258 (1947), Mr. Justice Jackson, for the Court, stated:

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as substitutes for appeals. As extraordinary remedies they are reserved for truly extraordinary cases." *Id.* at 260.

The use of the writ of mandamus, as was pointed out in *Roche v. Evaporated Milk Ass'n,* 319 U. S. 21, 26 (1943):

> "has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority where it is its duty to do so."

The Court, in *Bankers Life & Casualty Company v. Holland,* 346 U. S. 379, 383 (1953) stated:

> "The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or usurpation of judicial power."

And, the hardship of incurring a trial that may be unnecessary is not reason for the granting of the extraordinary writs. *United States Alkali Export Ass'n v. United States,* 325 U. S. 196, 202-203 (1945).

The various forms of mischief such rules restricting interlocutory review by mandamus are designed to prevent were explicated in *American Construction Co. v. Jacksonville, etc.,* 148 U. S. 372 (1893), as evasion of the rule limiting review to final judgments, premature decision of causes pending in lower courts, repeated and oppressive appeals on the same questions, and subversion of the whole system of jurisprudence. *Id.* at 379.

In the context of the above-cited authorities, the Court of Appeals did not abuse its discretion, or depart from the accepted and usual course of judicial proceedings, in refusing to issue the writ.

B. The District Court Has Not Exceeded Its Jurisdiction.

The petitioners contend that the lower court lacks subject matter jurisdiction to hear the merits of the antitrust action because of the so-called immunity of labor organizations to antitrust regulation. For example, the petition of the Trades Council states "[t]he immunity of labor organizations from antitrust regulation is almost total . . ." (p. 12). The petition of Local 542 echoes, even more boldly, "[u]nions may agree among themselves to force the elim-

ination of non-union business, to improve their own business, without any violations of the antitrust laws" (p. 8). There is no support to the petitioners' use of the so-called immunity of labor as a bar to the jurisdiction of the lower court.

This Court has on many occasions held that whether a union is liable under the antitrust laws depends on whether the conduct of the union violates the Sherman Act. *Ramsey v. United Mine Workers,* 401 U. S. 302 (1971); *United Mine Workers of America v. Pennington,* 381 U. S. 657 (1963); *Amalgamated Meat Cutters v. Jewel Tea Co., Inc.,* 381 U. S. 675 (1965); *Los Angeles Meat Drivers Union v. U. S.,* 371 U. S. 94 (1962); *Allen Bradley Co. v. Local Union 3,* 325 U. S. 797 (1945); *United States v. Hutchinson,* 312 U. S. 211 (1941); *Apex Hosiery Co. v. Leader,* 310 U. S. 469 (1940). In not one of these decisions did the Court hold that a district court has no power, as a matter of subject matter jurisdiction, to hear an antitrust claim against a union.

The cases hold that the so-called immunity of labor is lost where there is a direct restraint of the product market pursuant to a conspiracy with non-labor sources, as alleged in Count I; *Pennington; Allen-Bradley, supra.* It is also lost where there is a conspiracy to eliminate competition and to create a monopoly for the benefit of the favored class of employers where the labor activity is outside the scope of the collective bargaining relationship or is not otherwise condoned by national labor policy, as alleged in Court II; *Jewel Tea; Apex, supra.* Accordingly, the courts below correctly determined that there is no jurisdictional bar to hear the present action where the Trades Council and its constituent labor organizations are alleged to have combined and conspired among themselves and with non-labor entities to control the construction industry in

the greater Philadelphia area by eliminating open-shop contractors and to create a monopoly for the favored class of union contractors where the petitioners' activities are alleged to be beyond the scope of normal and legitimate labor activities.

To the extent that petitioners contend the District Court should have deferred its findings of fact and conclusions of law to the NLRB under the so-called "Doctrine of Primary Jurisdiction," this Court has recognized both that the doctrine is one of judicial discretion and that in the context of an antitrust action where the issue was whether a union acting alone violated the antitrust laws by insisting on limiting the Employers' hours of operations within the context of collective bargaining agreements, it was within the sound and proper discretion of the lower court to hear the merits of the antitrust action without deferring the matter to the NLRB. *Amalgamated Meat Cutters v. Jewel Tea, Inc.*, 381 U. S. 675 (1965).

Thus, the action of the District Court, being one of discretion, is not subject to the extraordinary writ of mandamus, which writ applies where the duty of the lower court is ministerial. Finally, the lower court's exercise of its discretion is proper, as this Court recognized in the *Jewel Tea* case.

A final point raised by petitioners is that the plaintiffs should have joined the union contractors as defendants and that the failure to do so rendered the Complaint "fatally defective" (Local 542 Petition, p. 12).

The courts have long held that the joinder of additional conspirators as defendants in a claim under the antitrust laws is optional with the plaintiff. *Georgia v. Pennsylvania R. R.*, 324 U. S. 439, 463, 464 (1945); *City of Atlanta v. Chattanooga Foundry & Pipeworks*, 127 F. 23, 25, 26 (6th Cir. 1903), *aff'd*, 203 U. S. 390 (1906); *Sidney Morris & Co. v. National Ass'n of Stationers, Etc.*, 40 F. 2d 620, 624 (7th

Cir. 1930); *Martin v. Chandler,* 85 F. Supp. 131, 132 (S. D. N. Y. 1949); *State of Washington v. American Pipe & Construction Co.,* 280 F. Supp. 802, 804, 805 (S. D. Cal.), *aff'd,* 393 F. 2d 568 (9th Cir.), *cert. denied,* 393 U. S. 842 (1968); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.,* 331 F. Supp. 92 (C. D. Cal. 1971), *aff'd,* 461 F. 2d 1261 (9th Cir.), *cert. denied,* 409 U. S. 950 (1972). The cases cited by petitioners are clearly inapposite.

Even assuming that the courts below erred in rejecting this contention, such error is not so fundamental a jurisdictional defect as to justify review by the extraordinary writ of mandamus.[7]

C. Preliminary Disclosure of Information Not Otherwise Subject to Confidentiality Is Not of Such Imperative Public Importance as to Justify the Deviation From Normal Appellate Processes and to Require Immediate Settlement in This Court.

The District Court has not yet ruled on any discovery motions filed by plaintiffs, as Local 542 admits at Page 5 of its petition. Yet petitioners both contend that their possible exposure to discovery justifies the extraordinary relief they have requested.

The Trades Council acknowledges, on page 11 of its petition, that its purpose in seeking a writ of certiorari is to preclude the District Court from ruling on plaintiffs' discovery motions:

> "This petition represents the unions' last hope of avoiding the irreparable harm that will flow from

7. Although there are surface similarities between this action and *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100* (No. 73-1256), in which this Court heard oral argument on November 19, 1974, that case did not involve the issue of the lower court's jurisdiction, as is raised by petitioners herein, so there is no reason to wait until the *Connell* case is decided before ruling on these petitions.

> even limited discovery by employer groups in a case where the District Court has no jurisdiction. • • •"

Similarly, Local 542 asserts, on page 5 of its petition:

> "It is obvious from all encompassing interrogatories as well the very nature of the suit, that the anti-union interests have launched a campaign to use discovery procedures in deadly inquisition into union activities which are protected and privileged • • •".

The petitioners state their potential exposure to discovery threatens them with the disclosure of information deemed confidential. The Trades Council states at page 24 of its petition:

> "The Circuit Court below has made certain that Altemose will have access to discovery procedures that can reveal the names of all union sympathizers on its payroll. • • • It is inconsequential that the District Court has not yet determined the limitations on 'relevant' discovery. The mere exercise of jurisdiction by the Court, coupled with the invocation of discovery procedures by plaintiffs, makes certain that some confidential information will be received by employer groups."

Clearly, where the District Court has not yet ruled, and where appellate relief from any future ruling is available, this case is not one of "imperative public importance". Since avoiding discovery is the true reason for the actions in the Court of Appeals and these petitions, the procedures are premature, as the District Court might well deny all or part of the motion to compel discovery or enter an appropriate protective order pursuant to Rule 26(c), Fed. R. Civ. P., and there is no evidence or indication that the District Court will not protect petitioners' rights under applicable law.

Furthermore, after the petition for certiorari was filed by the Trades Council, plaintiffs agreed, in discovery negotiations with petitioners, not to seek in discovery relating to the averments of the Complaint the names of union members or union sympathizers on Altemose's payroll, which information is the only material claimed as damaging by petitioners for purposes of their petitions to this Court. That discovery might become necessary regarding the class action allegations of petitioners' amended counterclaims, but that necessity will only arise when and if the district court determines that the counterclaims should proceed as a class action.

CONCLUSION.

For all of the reasons stated above, it is respectfully requested that Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit be denied.

Respectfully submitted,

November 15, 1974.

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